No. 42919-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOHN ALLEN BOOTH, JR.,

Appellant.

On Appeal from the Lewis County Superior Court
Cause No. 10-1-00485-2
The Honorable Richard Brosey, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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1. The trial court erred when it refused John Booth's proposed "to-convict" instructions, which correctly instructed the jury on its powers and obligations.

2. The "to-convict" instructions erroneously stated the jury had a "duty to return a verdict of guilty" if it found each element proved beyond a reasonable doubt.

3. The State failed to present sufficient evidence to prove beyond a reasonable doubt all of the elements of attempted extortion in the first degree.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. In a criminal trial, does a "to-convict" instruction, which informs the jury that it has a duty to return a verdict of guilty if it finds the elements have been proven beyond a reasonable doubt, violate a defendant's right to a jury trial, when there is no such duty under the state and federal Constitutions? (Assignments of Error 1 & 2)

2. Where the evidence at most established that John Booth might have expressly or implicitly communicated some sort of threat, did the State fail to prove that John Booth intended to commit the crime of first degree extortion by use of a

threat of bodily injury and fail to prove that Booth took a substantial step towards commission of this specific crime? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged John Allen Booth with: (count 1) second degree murder of David West, Sr. (RCW 9A.32.050); (count 2) first degree premeditated murder of David West, Jr. (RCW 9A.32.050); (count 3) first degree premeditated murder of Tony Williams (RCW 9A.32.050); (count 4) attempted first degree murder of Denise Salts (RCW 9A.32.030); (count 5) attempted first degree extortion (RCW 9A.56.110, .120); and (count 6) first degree unlawful possession of a firearm (RCW 9.41.040). (CP 69-76) The State also alleged that the offenses were aggravated because Booth was armed with a firearm during commission of the offenses (RCW 9.94A.602) (counts one through five); because the multiple offense policy would result in some offenses going unpunished (RCW 9.94A.535(2)(c) (counts one through six); and because Booth demonstrated an egregious lack of remorse (RCW 9.94A.535(3)(q)) (counts two and three). (CP 69-76)

Booth filed a number of pretrial motions, including a motion

to suppress evidence, a motion to dismiss (Knapstad motion), and a motion for a change of venue, but the trial court denied the motions. (10/28/11 RP 66-78, 92-106; 11/21/11 RP 2-7; CP 52-56, 77, 89-315, 452-56)[1]

The jury found Booth guilty on all charges, and found that all alleged aggravators were present. (12/15/12 RP 120-23; CP 557-69) The trial court found that Booth is a persistent offender and sentenced him to a term of life in prison. (12/16/11 RP 34-36; CP 635, 636, 638)

B. SUBSTANTIVE FACTS

David West. Sr., his son David West, Jr., and his girlfriend Denise Salts, all lived together in a house on 101 Wings Way in Lewis County. (12/09/11 RP 127-28, 129) Their friend Tony Williams was visiting West Sr. and Salts on the night of August 20-21, 2010. (12/09/11 RP 132-33) Sometime around midnight, West Sr.'s friend, John Lindberg, also arrived at the house to visit. (12/07/11 RP 116, 117-18) As he approached the house in his car, he noticed another car pulling into West's driveway. (12/07/11 RP 119, 120) The second car parked facing towards the road, and two

[1] Citations to the transcripts in this case will be to the date of the proceeding followed by the page number.

men got out. ((12/07/11 RP 120)

Lindberg and the two men all approached the house at the same time, were ushered into the kitchen, and sat down at the table. (12/07/11 RP 121-22) West Sr. introduced Lindberg to the two other men, John Booth and Ryan McCarthy. (12/07/11 RP 124; 12/09/11 RP 132)

According to Lindberg, West Sr. and Booth discussed a truck, and Booth asked to see pictures of it. (12/07/11 RP 128) West Sr. went to his computer in another room and retrieved pictures to show Booth. (12/07/11 RP 128, 129) Then Booth asked West Sr. if they could step outside to talk. (12/07/11 RP 130) Booth and West Sr. went outside together, and when they returned a short time later, West Sr. asked Lindberg if he had any money. (12/07/11 RP 130, 131, 146)

Lindberg then followed West Sr. into the master bedroom, where they discussed how much money Lindberg could give West Sr. (12/07/11 RP 146-47, 148) According to Lindberg, West Sr. grabbed a shotgun and declared "Fuck it. I'm going to end this bullshit once and for all." (12/07/11 RP 148) Lindberg saw West Sr. cock and raise the shotgun, then walk out of the room. (12/07/11 RP 149) He heard West Sr. tell Booth and McCarthy to

leave, then he heard the sound of three to four gunshots and saw West Sr. fall to the ground. (12/07/11 RP 149, 151, 201-02)

Denise Salts, who was outside in the garden, heard the sound of gunfire coming from inside the house. (12/09/11 RP 139-40) She entered the house through the kitchen door, and saw McCarthy sitting at the kitchen table and Booth standing next to him. (12/09/11 RP 141) Then she noticed that West Sr. was sitting on the floor and he appeared to be in pain. (12/09/11 RP 141, 149)

According to Salts, she turned to go back out the door, but Booth closed it and asked if she was going to call the police. (12/09/11 RP 141-42, 151) Salts testified that she could not remember exactly what happened next, but she does recall that Booth shot her in the face. (12/09/11 RP 142)

Lindberg testified that he could hear Salts talking in the kitchen, then heard a bang, then heard what he believed was Salts falling to the floor. (12/07/11 RP 151) He also heard Tony Williams saying, "Don't. Don't. You don't have to shoot." (12/07/11 RP 152) He then heard a fumbling sound, followed by another gunshot. (12/07/11 RP 152) When Lindberg looked out of the bedroom, he saw Booth holding the gun and firing at West Sr.'s head. (RP 154)

While Booth was turned away, Lindberg ran towards the

master bathroom and closed the door. (12/07/11 RP 154-55) He then heard another bang and the sound of another person falling to the floor. (12/07/11 RP 154-55) After hiding in the bathroom for about 20-30 minutes, Lindberg ventured out. (12/07/11 RP 156) He saw no sign of Booth or McCarthy, so he ran out of the house, got in his car, and drove away. (12/07/11 RP 157-58)

A neighbor called 911, and several units responded. (12/07/11 RP 214-15, 12/12/11 RP 208-09; 12/13/11 RP 33, 109, 113) On his way to the scene, Lewis County Sheriff's Deputy Mathew Wallace passed Lindberg's car as it sped away from the West home. (12/07/11 RP 160, 217-18) Lindberg pulled to the side of the road and Wallace stopped his vehicle and contacted Lindberg. (12/07/11 RP 218-19) A visibly shaken Lindberg told Wallace what had happened. (12/07/11 RP 160, 219, 220) Lindberg told Wallace that he believed Booth was the shooter, and Lindberg subsequently identified Booth from a photo montage that Wallace created. (12/07/11 RP 160-61, 233-34, 235)

Responding officers found West Sr.'s body propped against a wall near the dining room, West Jr.'s body between an end table and a couch in the living room, and Wiliams' body on the floor in the hallway. (12/07/11 RP 25, 27, 33; 12/09/11 RP 68-69; 12/12/11 RP

215) The cocked shotgun was resting by West Sr.'s side. (12/08/11 RP 165, 169-70; 12/12/11 RP 215, 221) Salts was found lying on the kitchen floor, wounded but alive. (12/13/12 RP 193)

West Sr. sustained three gunshot wounds: one to his abdomen and one to his thigh, neither of which were necessarily fatal, and one fatal shot to his head. (12/08/11 RP 51-57) West Jr. sustained two gunshot wounds: one to his chest, which was survivable if medical treatment was received, and one to his head, which was fatal. (12/08/11 RP 36-47) Williams died from a single gunshot to his head. (12/08/11 RP 58-61)

Around seven in the morning on August 21st, Gregory Sage received a phone call from Booth. (12/09/11 RP 110, 112-13) According to Sage, Booth sounded "frantic," and he told Sage that someone pulled a gun on him and he "had to drop him." (12/09/11 RP 113)

The search for Booth eventually lead police to a home in Spokane, where they identified and arrested Booth. (12/13/11 RP 59-60; 62-64) The homeowner testified that a friend brought Booth to his house on August 21, and that Booth stayed with him for several nights. (12/07/11 RP 70, 71-72; 12/12/11 RP 230)

While he was in custody awaiting trial, all of Booth's phone

calls were monitored and recorded. (12/13/11 RP 13-14) One call in particular caught the attention of investigators. In that call, Booth can be heard talking to a friend in Spokane, and telling the friend that he is concerned that he left a "heater" on in the attic of the Spokane home where he had stayed. (12/13/11 RP 15, 18-19; Exh. 107) Investigators believed that the word "heater" was actually a reference to Booth's firearm. (12/13/11 RP 18-19)

Spokane detectives returned to the home with a search warrant, and found a 9mm handgun hidden in the attic. (12/07/11 RP 86, 89, 94) DNA matching Booth was found on the handgun. (12/09/11 RP 92, 94, 95) And photographs saved on Booth's cellular phone show Booth holding a similar handgun. (12/12/11 RP 239)

The undamaged bullets collected from the West home were analyzed and determined to have been fired from that handgun. (12/12/11 RP 30, 38, 41-42, 45, 49, 54) The damaged bullets could not be matched to the handgun, but could not be excluded either. (12/12/11 RP 49-50) Investigators found no indication that a second weapon was fired at the West home that night. (12/13/11 RP 132-33)

Several witnesses testified about their prior contacts with

Booth. Raymond Hankins testified that he met Booth in February of 2010. (12/12/11 RP 163) Hankins owed money to a man named Robbie Russell, and Booth was with Russell when he came to collect money from Hankins. (12/12/11 RP 163-64, 165) Booth returned on August 20th, accompanied by McCarthy, to discuss payment for the remainder of Hankins' debt. (12/12/11 RP 167) Hankins testified that Booth did not make any threats. (12/12/11 RP 171)

Linn Perry testified that he encountered Booth at Perry's son's house in July of 2010. (12/12/11 RP 174-75) Booth told Perry that his son owed Booth money. (12/12/11 RP 176) According to Perry, Booth told him he had killed someone over money before, and would kill Perry's son too if he did not pay the debt. (12/12/11 RP 176-77) Perry believed that the statements were merely bravado, and did not believe that Booth's threat was genuine. (12/12/11 RP 179-80)

Lashawana Wolfe met Booth in mid-August of 2010. They spent an evening together drinking and flirting. (12/12/11 RP 126, 127-28, 132) As Booth drove Wolfe and another man from one bar to another, Booth indicated to Wolfe that he had weapons in his car. (12/12/11 RP 131-32) Booth also told Wolfe that he and his

friend worked as painters in Tacoma, but they also worked on the side as "taxers"—people who collect drug debts. (12/12/11 RP 133) According to Wolfe, Booth told her that he and his friend were in Lewis County on "business." (12/12/11 RP 133)

According to Wolfe, she accompanied Booth and his friend to a house on Wings Way. (12/12/11 RP 134-35) As she waited in the car for Booth to finish his business, she opened the glove box and saw a gun. (12/12/11 RP 136-37) After they left, Booth said he got some of his money, but not all of it. (12/12/11 RP 139) About a week later, she heard about the shootings at that same house on Wings Way. (12/12/11 RP 137-38)

Jessica Porter is West Sr.'s daughter. (12/12/11 RP 182) She and her family arrived at West's house for a visit on August 7, 2010. (12/12/11 RP 185, 198) The next day, Russell, Booth and McCarthy came to the house. (12/12/11 RP 187) Booth sat in the living room talking to West Jr., while Russell and West Sr. talked privately in the bedroom. (12/12/11 RP 188-89) According to Porter, Russell came out of the bedroom, winked at Booth, then they left. (12/12/11 RP 190)

After they left, West Sr. immediately told Porter that she and her family needed to go home. (12/12/11 RP 190) Porter thought

her father's behavior was odd. (12/12/11 RP 190) Porter's boyfriend, Shane Reynolds, also thought West Sr. seemed upset and scared after the visit from Russell, Booth and McCarthy. (12/12/11 RP 197, 203)

Ryan Miller testified that he and Booth worked together in the summer of 2010. (12/12/11 RP 114) On Friday, August 19th, Booth told him that there was a man in town who owed him $20,000, and that he might be getting that money over the weekend. (12/12/11 RP 115)

On August 20th, West Sr. called his friend, Robert Downing, and offered to sell Downing his boat. (12/12/11 RP 119) West Sr. purchased the boat for about $6500, but he offered it to Downing for just $1000. (12/12/11 RP 121-22)

Booth testified at trial on his own behalf. He and West Sr. knew each other because they both sell drugs. (12/14/11 RP 61) In July of 2010, Booth "fronted" West Sr. a pound of methamphetamine, worth $14,000. (12/14/11 RP 61-62) They agreed that West Sr. would pay Booth in one week, but the following week West Sr. only gave Booth $5,000. (12/14/11 RP 62) They agreed that West Sr. would pay Booth $1,000 a week until the debt was paid off. (12/14/11 RP 62)

On August 20th, West Sr. called Booth and said he had money to pay Booth. (12/14/11 RP 62-63) When Booth arrived at the home, West Sr. did not have any money. (12/14/11 RP 63) West Sr. told Booth that he would have the money later that night, so Booth arranged for his friend to stay at the house until West Sr. had the money. (12/14/11 RP 64) Because Booth had other business to attend to, he left with the expectation that his friend would call him for a ride once he received the money from West Sr. (12/14/11 RP 64) His friend did call him later, and Booth arranged for another friend to pick him up. (12/12/11 RP 64)

The next day, when Booth saw his friend, the friend told Booth what had happened. (12/12/11 RP 65) To help his friend, Booth took the gun his friend had used at the West house, and cleaned off any fingerprints or DNA that his friend might have left on the gun. (12/12/11 RP 65) Later that day Booth started getting calls from friends telling him the police were looking for him, so he decided to flee to Spokane. (12/12/11 RP 67)

Booth denied shooting the people at the West house, and denied being present when the shooting occurred. (12/12/11 RP 86)

IV. ARGUMENT & AUTHORITIES

A. BOOTH'S CONSTITUTIONAL RIGHT TO A JURY TRIAL WAS VIOLATED BY THE COURT'S "TO-CONVICT" INSTRUCTIONS, WHICH AFFIRMATIVELY MISLED THE JURY ABOUT ITS POWER TO ACQUIT.

Over defense objection, the trial court included the following language in all of the "to-convict" instructions:

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(CP 505-17, 527, 530, 531, 531, 536, 540; 12/14/11 RP 123-26, 139) These instructions misstated the law and violated Booth's right to a properly instructed jury because there is no "duty to convict under either the federal or state constitutions."[2]

1. Standard of Review

Constitutional violations are reviewed *do novo*. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are also reviewed *de novo*. State v. Bennett, 161

[2] Division One of the Court of Appeals rejected the arguments raised here in its decision in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319 (1998). Booth respectfully contends that Meggyesy was incorrectly decided and should not be followed by this Court.

Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kyllo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

2. The United States Constitution

In criminal trials, the right to a jury trial is fundamental to the American scheme of justice. It is guaranteed by the Sixth Amendment and the due process clauses of both the Fifth and Fourteenth Amendments.[3] Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982).

Trial by jury is not only a valued right of persons accused of a crime, but also an allocation of political power to the citizenry.

> [T]he jury trial provisions in the Federal and State constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers of the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this instance upon community participation in the determination of guilt or innocence.

Duncan, 391 U.S. at 156.

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[3] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" U.S. Const. Amend. VI. "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. Const Amend. V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const Amend. XIV.

3. Washington Constitution

The Washington Constitution provides greater protection to its citizens in some areas than does the United States Constitution. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Under Gunwall, the decision whether to conduct an independent analysis under the state constitution must be based on six factors: (1) the language of the Washington Constitution, (2) differences between the state and federal language; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Under the Gunwall analysis, it is clear that the right to a jury trial is such an area, requiring an independent analysis under the Washington State constitution.

a. *The Textual Language of the State Constitution*

The drafters of our state constitution not only guaranteed the right to a jury trial,[4] they expressly declared that "[t]he right of trial by jury shall remain inviolate[.]"[5]

> The term "inviolate" connotes deserving of the highest protection . . . Applied to the right to trial by jury, this language indicates that the right must remain the

[4] "Rights of Accused Persons. In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed . . . ." Wash Const. art. I, § 22. No person "shall be deprived of life, liberty, or property, without due process of law." Wash. Const. art. I, § 3.

[5] Wash Const. art. I, § 21.

> essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assault to its essential guarantees.

Sofie v. Fiberboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Article I, section 21 "preserves the right [to a jury trial] as it existed in the territory at the time of its adoption." Mace, 98 Wn.2d 96; State v. Strasburg, 60 Wn. 106, 115, 110 P.2d 1020 (1910). And the right to a trial by jury "should be continued unimpaired and inviolate" Strasburg, 60 Wn. at 115.

Other constitutional protections exist in the Washington constitution to further safeguard this right. For example, a court is not permitted to convey to the jury its own impression of the evidence. Wash. Const. art. IV, § 16.[6] Even a witness may not invade the province of the jury by giving an opinion on the guilt of the accused. State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987).

The different and more specific language in the Washington constitution suggests the drafters intended different and more expansive protections than those provided by the federal constitution. See Hon. Robert F. Utter, FREEDOM AND DIVERSITY IN A

[6] "Judges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law."

FEDERAL SYSTEM: PERSPECTIVES ON STATE CONSTITUTIONS AND THE WASHINGTON DECLARATION OF RIGHTS, 7 U. Puget Sound L. Rev. 491, 515 (1984). Thus, while the Court in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319 (1998), may have been correct when it found there is no specific constitutional language that addresses this precise issue, the existing language indicates that the right to a jury trial is so fundamental that *any* infringement violates the constitution.

b. *State Constitutional and Common Law History*

State constitutional history favors an independent application of Article I, sections 21 and 22. In 1889 (when the Washington constitution was adopted), the Sixth Amendment did not apply to the states. Instead, Washington based its Declaration of Rights on the Bill of Rights of other states, which relied on common law and not the federal constitution. State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001) (citing Utter, 7 U. Puget Sound Law Review at 497). This difference supports an independent reading of the Washington Constitution.

State common law history also favors an independent application. Article I, section 21 "preserves the right as it existed at common law in the territory at the time of its adoption." Sofie, 112

Wn.2d at 645; Mace, 98 Wn.2d 96; *see also* State v. Hobble, 126 Wn.2d 283, 299, 892 P.2d 85 (1995). Under common law, juries were instructed in such a way as to allow them to acquit even where the prosecution proved guilt beyond a reasonable doubt.

For example, in Leonard v. Territory, 2 Wash. Terr. 381, 7 Pac. 872 (1885), the Supreme Court reversed a murder conviction and set out in some detail the jury instructions given in the case. The court instructed jurors that they "should" convict and "may" find the defendant guilty if the prosecution proved its case, but that they "must" acquit in the absence of such proof. Leonard, 2 Wash. Terr. at 398-99. Thus, common law *required* the jury to acquit upon a failure of proof, and *allowed* the jury to acquit even if the proof was sufficient. Leonard, 2 Wash. Terr. at 398-99.

The Court of Appeals in Meggyesy attempted to distinguish Leonard on the basis that the Leonard court was not specifically approving or adopting this specific language, but was "simply quoting the relevant instruction," Meggyesy, 90 Wn. App. at 703. But the Meggyesy court missed the point—at the time the Washington Constitution was adopted, courts instructed juries using the permissive "may" as opposed to the current practice of instructing a jury on its "duty" to convict. Thus, the current

instructional practice does not comport with the scope of the right to a jury trial existing at the time of adoption, and should now be re-examined.

c. *Preexisting State Law*

In criminal cases, an accused person's guilt has always been the sole province of the jury. State v. Kitchen, 46 Wn. App. 232, 238, 730 P.2d 103 (1986); see also State v. Holmes, 68 Wn. 7, 122 P. 345 (1912). This rule even applies where the jury ignores applicable law. *See e.g.*, Hartigan v. Washington Territory, 1 Wash. Terr. 447, 449 (1874) ("[T]he jury may find a general verdict compounded of law and fact, and if it is for the defendant, and is plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy.")[7]

d. *Difference in Federal and State Constitutional Structures*

State constitutions were originally intended to be the primary instruments for protecting individual rights, with the United States Constitution serving as a secondary layer of protection. Utter, 7 U. Puget Sound L. Rev. at 497; Utter & Pitler, PRESENTING A STATE AND CONSTITUTIONAL ARGUMENT: COMMENT ON THEORY AND TECHNIQUE,

[7] This is likewise true in the federal system. *See e.g.*, United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969).

20 Ind. L. Rev. 637, 636 (1987). Accordingly, state constitutions were intended to give broader protection than the federal constitution. An independent interpretation under Washington's Constitution is necessary to accomplish this end. This factor will nearly always support an independent interpretation of the state constitution because the difference in structure is a constant. Gunwall, 106 Wn.2d at 62, 66; *see also* State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

e. *Matters of Particular State Interest or Local Concern*

The manner of conducting criminal trials in state court is of particular local concern, and does not require adherence to a national standard. *See e.g.,* State v. Smith, 150 Wn.2d 135, 152, 75 P.3d 934 (2003); State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994). Gunwall factor number six thus also requires an independent application of the state constitutional provision in this case.

f. *An Independent Analysis is Warranted*

All six Gunwall factors favor an independent application of Article I, sections 21 and 22 of the Washington Constitution in this case. The state constitution provides greater protection than the

federal constitution, and prohibits a trial court from affirmatively misleading a jury about its power to acquit.

4. Jury's Power to Acquit

A court may never direct a verdict of guilty in a criminal case. United States v. Garaway, 425 F.2d 185 (9th Cir 1979) (directed verdict of guilty improper even where no issues of fact are in dispute); Holmes, 68 Wn. at 12-13. If a court improperly withdraws a particular issue from the jury's consideration, it may deny the defendant the right to a jury trial. United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (improper to withdraw issue of "materiality" of false statement from jury's consideration); see also Neder v. United States, 527 U.S. 1, 8, 15-16, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (omission of element in jury instruction subject to harmless error analysis).

The constitutional protections against double jeopardy also protect the right to a jury trial by prohibiting a retrial after a verdict of acquittal. U.S. Const. amd V; Wash. Const. art I. § 9.[8] A jury verdict of not guilty is thus non-reviewable.

Also well established is "the principle of noncoercion of

[8] "No person shall be . . . twice put in jeopardy for the same offense."

jurors," established in Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay his fine. In issuing a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts. *See* Alschuler & Deiss, A BRIEF HISTORY OF THE CRIMINAL JURY IN THE UNITED STATES, 61 Chi. L. Rev. 867, 912-13 (1994).

If there is no ability to review a jury verdict of acquittal, no authority to direct a guilty verdict, and no authority to coerce a jury in its decision, there can be no "duty to return a verdict of guilty." Indeed, there is no authority in law that suggests such a duty.

> We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. . . . If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the court's must abide by that decision.

United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969).

This is not to say there is a right to instruct the jury that it

may disregard the law in reaching its verdict. *See e.g.*, United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991) (reversing conviction on other grounds). But under Washington law, juries have always had the ability to deliver a verdict of acquittal that seems to defy the evidence. A judge cannot direct a verdict for the state because this would ignore "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power." State v. Primrose, 32 Wn. App. 1, 4, 645 P.2d 714 (1982); *see also* State v. Salazar, 59 Wn. App. 202, 211, 796 P.2d 773 (1990) (relying on jury's "constitutional prerogative to acquit" as basis for upholding admission of evidence). An instruction telling jurors that they *may not* acquit if the elements have been established affirmatively misstates the law, and deceives the jury as to its own power and prerogative. Such an instruction fails to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864.

5. Examples of Correct Legal Standard Instructions

Permission to convict as opposed to a duty to convict is well-illustrated in the instruction quoted in Leonard:

> If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you *may* find him guilty of such a degree of the crime

> as the facts so found show him to have committed; but if you do not find such facts so proven, then you *must* acquit.

Leonard, 2 Wash. Terr. At 399 (emphasis added). This was the law as given to the jury in murder trials in 1885, just four years before the adoption of the Washington Constitution.

The Washington Pattern Jury Instruction Committee has adopted accurate language consistent with Leonard for considering a special verdict. WPIC 160.00, the concluding instruction for a special verdict, in which the burden of proof is precisely the same, reads:

> . . . In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. . . . If you unanimously have a reasonable doubt as to this question, you must answer "no."

The due process requirements to return a special verdict—that the jury must find each element of the special verdict proved beyond a reasonable doubt—are exactly the same as for the elements of the general verdict. This language in no way instructs the jury on "jury nullification." But it at no time imposes a "duty" to answer "yes."

In contrast, the "to-convict" instructions in this case shift power away from the jury and contravene "the undisputed power of the jury to acquit." Moylan, 417 F.2d at 1006. They misstate the

role of the jury and provide a level of coercion for the jury to return a guilty verdict. Such coercion is prohibited. Leonard, supra; State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978).

6. The Court Should Not Follow the Meggyessy Court's Opinion Because Its Analysis Was Flawed

In Meggyesy, the appellant challenged WPIC's "duty to return a verdict of guilty" language. The court held the federal and state constitutions did not "preclude" this language, and so affirmed. Meggyesy, 90 Wn. App. at 696.

In its analysis, Division One characterized the alternative language proposed by the defendants—"you *may* return a verdict of guilty"—as "an instruction notifying the jury of its power to acquit against the evidence." Meggyesy, 90 Wn. App. at 699. The court spent much of its opinion concluding there was no legal authority requiring the court to instruct a jury that it had the power to acquit against the evidence.

This Court has followed the Meggyesy holding. In State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), this Court echoed Division One's concerns that instructing with the language "may" was tantamount to instructing on jury nullification.

Appellant respectfully submits that the Meggyesy analysis

addressed a different issue than the one argued in this case. "Duty" is the challenged language herein. By focusing on the proposed remedy, the Meggyesy court (and subsequently the Bonisisio court) side-stepped the underlying issue: the instructions given violated the defendants' right to trial by jury because the "duty to return a verdict of guilty" language required the juries to convict if they found that the State proved all of the elements of the charged crimes.

Furthermore, unlike the appellants in Meggyesy and Bonisisio, Booth did not ask the court to use an instruction that affirmatively notifies the jury of its power to acquit. Instead, he simply argued that jurors should not be affirmatively misled. Toward that end, the "to-convict" instructions proposed by Booth stated:

> In order to return a verdict of guilty, you must unanimously find from the evidence that each of these elements had been proved beyond a reasonable doubt.
>
> On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(CP 498-502, 505) Such language was not addressed in either Meggyesy or Bonisisio; thus the holdings should not govern here.

7. The Court's Instructions in this Case Affirmatively Misled the Jury About its Power to Acquit Even if the Prosecution Proved its Case Beyond A Reasonable Doubt

The instruction given in Booth's case did not contain a correct statement of the law. The court instructed the jurors that it was their "duty" to convict Booth if the elements were proved beyond a reasonable doubt. (CP 527, 530, 531, 531, 536, 540) The court's use of the word "duty" in the "to-convict" instructions commanded the jury that it *could not* acquit if the elements had been established. This coercive misstatement of the law deceived the jurors about their power to acquit in the face of sufficient evidence, and failed to make the correct legal standard manifestly apparent to the average juror. By instructing the jury that it had a duty to return a verdict of guilty based merely on finding certain facts, the court took away from the jury its constitutional authority to apply the law to the facts in reaching its general verdict.

B. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT ALL OF THE ELEMENTS OF ATTEMPTED EXTORTION IN THE FIRST DEGREE.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826,

849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

In this case, the State charged Booth with attempted first degree extortion. (CP 73-74) The attempt statute, RCW 9A.28.020, provides: "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime." Extortion is defined by RCW 9A.56.110 as "knowingly to obtain or attempt to obtain by threat property or services of the owner[.]" First-degree extortion is extortion committed by means of a "threat" as defined by RCW 9A.04.110(28)(a), (b) or (c). RCW 9A.56.120.[9]

[9] RCW 9A.56.120 actually refers to RCW 9A.04.110(27) for the definition of "threat." However subsection (27) defines the term "suffocation," while subsection (28) defines the term "threat." This appears to be an "inadvertent numbering error" on the part of the Legislature. See State v. King, 111 Wn. App. 430, 436, 45 P.3d 221, 224 (2002).

According to that definition:

> "Threat" means to communicate, directly or indirectly the intent:
> (a) To cause bodily injury in the future to the person threatened or to any other person; or
> (b) To cause physical damage to the property of a person other than the actor; or
> (c) To subject the person threatened or any other person to physical confinement or restraint[.]

RCW 9A.04.110(28).

In this case, the State elected to instruct the jury that it must find that Booth intended to communicate a *threat of bodily injury* to West Sr. in order to obtain money from West Sr., and that he performed an act that was a substantial step towards that goal. (CP 533-38)

The State's evidence showed that West Sr. owed Booth (or Booth's associate) money, that West Sr. became agitated when Booth arrived to collect payment, and sometime earlier that summer Booth indicated to a third party unfamiliar to West Sr. that he would harm a debtor if the debtor did not satisfy the debt. (12/07/11 RP 146-47, 12/12/11 RP 176-77, 190, 197, 203; 12/14/11 RP 61-62)

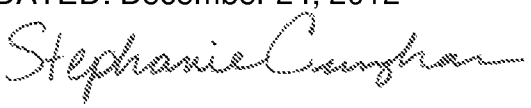
Based on this, the jury was asked to infer that Booth made or intended to make the same threat to West Sr. But a threat of

bodily injury is not the only type of threat that could cause a person to become agitated.[10] Thus, while the State's evidence may support an inference that some sort of threat was made or implied, it does not establish beyond a reasonable doubt that a specific threat of bodily injury was intended to be made or implied. The State failed to prove that Booth intended to, and took a substantial step towards, obtaining money by use of a threat of physical injury.

V. CONCLUSION

The instruction commanding a "duty" to return a verdict of guilty was an incorrect statement of the law and undermined the jury's inherent power to acquit. The error violated Booth's state and federal constitutional right to a jury trial. Accordingly, his convictions must be reversed and the case remanded for a new trial. Alternatively, Booth's conviction for attempted first degree extortion must be reversed because the State did not prove all of the essential elements beyond a reasonable doubt.

DATED: December 24, 2012



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for John Allen Booth

[10] The Legislature conceived of ten different types of threats in RCW 9A.04.110(28).

CERTIFICATE OF MAILING

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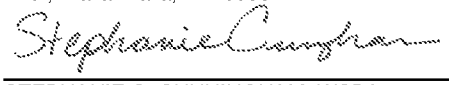

STEPHANIE C. CUNNINGHAM, WSBA #26436

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